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In the Supreme Court of the United States

OCTOBER TERM, 1983

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
APPELLANT

v.

ALLSTATE INSURANCE COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

DAVID L. SLATE
General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506

QUESTIONS PRESENTED

1. Whether the Court has jurisdiction over this appeal under 28 U.S.C. 1252 even though the Equal Employment Opportunity Commission does not seek review of the district court's holding that the one-House legislative veto provision of the Reorganization Act of 1977 (5 U.S.C. 906) is unconstitutional, but instead seeks review only of the relief ordered by the district court.

2. Whether the district court correctly held that, because the legislative veto provision in the Reorganization Act is unconstitutional, the Commission cannot exercise the authority transferred to it by Reorganization Plan No. 1 of 1978 to enforce the Equal Pay Act (29 U.S.C. 206(d)).

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App., *infra*, 1a-19a) is reported at 570 F. Supp. 1224.

JURISDICTION

The order of the district court granting summary judgment to appellee was entered on August 19, 1983 (App., *infra*, 20a), and the opinion of the district court was rendered on September 9, 1983 (App., *infra*, 1a-19a). The notice of appeal was filed on September 16, 1983 (App., *infra*, 21a). By order dated November 7, 1983, Justice White extended the time within which to docket the appeal to and including December 15, 1983. If this Court has jurisdiction in this case, it would be under 28 U.S.C. 1252. However, we do not believe the Court has jurisdiction under 28 U.S.C. 1252 because the Equal Employment Opportunity Commission does not seek review of the district court's holding that

the legislative veto provision of the Reorganization Act of 1977 is unconstitutional. See pages 6-8, *infra*. This appeal therefore is taken for protective purposes only pending a decision by the Court in *Heckler* v. *Edwards*, No. 82-874 (argued Nov. 30, 1983). The Commission also has filed a notice of appeal to the court of appeals under 28 U.S.C. 1291.

STATUTORY AND REORGANIZATION PLAN PROVISIONS INVOLVED

The relevant provisions of the Reorganization Act of 1977, Pub. L. No. 95-17, 91 Stat. 29, 5 U.S.C. 901 *et seq.*; the Equal Pay Act of 1963 (Section 6(d) of the Fair Labor Standards Act of 1938), 29 U.S.C. 206(d)); Sections 16(c) and 17 of the Fair Labor Standards Act, 29 U.S.C. (& Supp. V) 216(c) and 217; and Reorganization Plan No. 1 of 1978, 92 Stat. 3781, are set forth in App., *infra*, 22a-30a.

STATEMENT

This action was filed by the Equal Employment Opportunity Commission in the United States District Court for the Southern District of Mississippi on April 14, 1982, pursuant to Sections 16(c) and 17 of the Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. V) 216(c) and 217. The complaint alleges that appellee Allstate Insurance Company is violating Section 6(d) of the Fair Labor Standards Act, 29 U.S.C. 206(d)—commonly known as the Equal Pay Act—by paying lower wages to female unit supervisors and underwriters than it pays to male unit supervisors and underwriters performing equal work (Comp. ¶ 7).

When the Equal Pay Act was first enacted in 1963 (Pub. L. No. 88-38, 77 Stat. 56), enforcement authority was vested in the Secretary of Labor, who is responsible for administering the Fair Labor Standards Act generally. See 29 U.S.C. (& Supp. V) 206(d)(3), 216(c) and 217. However, responsibility for administration and enforcement of the Equal Pay Act was transferred from

the Secretary of Labor to the Equal Employment Opportunity Commission by Reorganization Plan No. 1 of 1978, 92 Stat. 3781,[1] which also transferred other equal employment opportunity functions to the Commission.[2] The purpose of the Reorganization Plan was "to consolidate[] Federal equal employment opportunity activities" and to provide, "for the first time, the foundation of a unified, coherent Federal structure to combat job discrimination in all its forms." I Pub. Papers 400 (1978). The transfer of Equal Pay Act functions to the Commission was specifically designed to "minimize overlap and centralize enforcement of statutory prohibitions against sex discrimination in employment," since the Commission already was empowered to enforce Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* I Pub. Papers 403 (1978).

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[1] Reorganization Plan No. 1 of 1978 transferred "[a]ll functions related to enforcing or administering Section 6(d) of the Fair Labor Standards Act, as amended, 29 U.S.C. 206(d) * * * to the Equal Employment Opportunity Commission." Reorg. Plan, § 1. "Such functions include, but shall not be limited to, the functions relating to equal pay administration and enforcement now vested in the Secretary of Labor [and] the Administrator of the Wage and Hour Division of the Department of Labor pursuant to Sections * * * 16(b) and (c) * * * and 17 of the Fair Labor Standards Act." *Ibid.*

[2] The Reorganization Plan also transferred to the Commission: (1) functions vested in the Secretary of Labor and the Civil Service Commission under the Age Discrimination in Employment Act of 1967 (Reorg. Plan, § 2); (2) federal equal employment opportunity enforcement and related functions vested in the Civil Service Commission (Reorg. Plan, § 3); (3) enforcement and related functions vested in the Civil Service Commission pursuant to Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. 791, with respect to federal employment of handicapped persons (Reorg. Plan, § 4); and (4) functions of the Equal Employment Opportunity Coordinating Council, 42 U.S.C. 2000(e)-14 (Reorg. Plan, § 5).

The Reorganization Plan was implemented pursuant to the Reorganization Act of 1977, (Pub. L. No. 95-17, 91 Stat. 29, 5 U.S.C. 901 *et seq.*), which conferred on the President authority to reorganize operations of the Executive departments and agencies subject to certain conditions and limitations imposed by Congress. This reorganization authority previously had expired in 1973. 5 U.S.C. (1976 ed.) 905(b). The authority was reactivated in 1977 for a period of three years (91 Stat. 32) and, after a one-year extension, it expired on April 6, 1981. 5 U.S.C. 905(b).

Under 5 U.S.C. 903, the President was required to transmit any reorganization plan to both Houses of Congress. The reorganization plan then would become "effective" at the end of 60 days of continuous session of Congress after transmittal, unless during that time either House passed a resolution stating in substance that it did not favor the plan. 5 U.S.C. 906(a). A plan that was not vetoed by either House and therefore became effective was to be printed "in the Statutes at Large in the same volume as the public laws" (5 U.S.C. 906(d)). The Reorganization Act further provided that if a statute had vested a function in the agency from which it was removed under a reorganization plan, that function "shall be deemed as vested in the agency under which the function is placed by the plan." 5 U.S.C. 907(a).

In accordance with the requirements of the Reorganization Act, Reorganization Plan No. 1 of 1978 was transmitted by the President to Congress on February 23, 1978. I Pub. Papers 400 (1978). The House of Representatives rejected a resolution disapproving the Plan by a vote of 356 to 39. H.R. Res. 1049, 95th Cong., 2d Sess. (1978); 124 Cong. Rec. 11336-11337 (1978). The Senate Committee on Governmental Affairs unanimously recommended against passage of a resolution of disapproval by the Senate (S. Res. 404, 95th Cong., 2d Sess. (1978); S. Rep. 95-750, 95th Cong., 2d Sess. 6, 10 (1978)), although the resolution of disapproval was not

brought to a vote by the full Senate. See 124 Cong. Rec. 12888 (1978). Because the Reorganization Plan was not vetoed by either House of Congress, it became effective on May 6, 1978 and was printed in the Statutes at Large. 92 Stat. 3781-3782. The particular portions of the Plan relating to enforcement of the Equal Pay Act were implemented on July 1, 1979. Exec. Order No. 12,144, 44 Fed. Reg. 37193 (1979).

2. On August 9, 1983, appellee moved for summary judgment in this action, contending that the transfer of authority to the Commission to enforce the Equal Pay Act was invalid because of the presence of the legislative veto provision in the Reorganization Act. The Commission conceded that the legislative veto provision is unconstitutional in light of this Court's decision in *INS* v. *Chadha*, No. 80-1832 (June 23, 1983), which struck down the legislative veto provision in Section 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. 1254(c)(2). Appellee further contended that the legislative veto provision is not severable from the remainder of the Reorganization Act; that Reorganization Plan No. 1 of 1978 is invalid as a result, even though it was not vetoed by either House of Congress; and that the Commission therefore is without authority to enforce the Equal Pay Act.

The district court agreed with appellee's arguments, and dismissed the complaint (App., *infra*, 1a-19a). The court rejected the Commission's submission that the legislative veto provision is severable from the remainder of the Act, that the decision in *Chadha* should not be applied retroactively to invalidate plans that were not vetoed and therefore went into effect prior to the date of the *Chadha* decision, and that Congress in any event had ratified the transfer of authority to the Commission (*id.* at 6a-19a).

THE COURT DOES NOT HAVE JURISDICTION OVER THIS APPEAL UNDER 28 U.S.C. 1252

This direct appeal under 28 U.S.C. 1252 has been docketed for protective purposes only, pending a decision in *Heckler* v. *Edwards*, No. 82-874 (argued Nov. 30, 1983). We have argued in *Edwards* that a direct appeal to this Court does not lie under 28 U.S.C. 1252 when the appellant does not seek review of the holding that an Act of Congress is unconstitutional and instead challenges only the relief granted by the district court. An appeal challenging only the relief instead must be taken to the court of appeals pursuant to 28 U.S.C. 1291, in the same manner as all other appeals that do not raise the question of the constitutionality of an Act of Congress.[3] For the reasons explained below, the jurisdictional position we have urged in *Edwards* applies equally here. The Commission's appeal therefore lies to the court of appeals under 28 U.S.C. 1291. Accordingly, in addition to taking a protective direct appeal to this Court, the Commission, on October 14, 1983, also filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit (No 83-4656).[4]

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[3] We have furnished appellee with copies of our briefs in *Heckler* v. *Edwards*.

[4] On November 23, 1983, appellee filed a motion in the court of appeals to dismiss the Commission's appeal under 28 U.S.C. 1291, contending that the appeal instead must be taken to this Court under Section 1252. The Commission filed an opposition to the motion to dismiss on December 5, 1983, advancing the position we have taken in *Heckler* v. *Edwards* that a direct appeal does not lie when the appellant does not seek review of the district court's holding that an Act of Congress is unconstitutional. The Commission also suggested that the court of appeals in any event not dismiss the appeal while the question of appellate jurisdiction is pending before this Court in *Edwards* and that the

The Commission conceded in district court that the one-House legislative veto provision in the Reorganization Act is unconstitutional in light of the decision in *Chadha*, and it does not seek review on appeal of the district court's holding that the statutory provision is unconstitutional. The Commission seeks review only of the relief ordered by the district court: dismissal of the Commission's enforcement action. That relief was based on the district court's conclusions that the legislative veto provision of the Reorganization Act is not severable from the remainder of the Act, that Congress intended that even completed reorganization plans would be invalidated if the legislative veto provision were held unconstitutional, and that this Court's decision in *Chadha* should be applied retroactively to invalidate reorganization plans that became effective prior to the Court's decision in that case. These issues do not concern the constitutionality of an Act of Congress.

Whether the legislative veto provision is severable from the remainder of the Act and whether Congress intended even completed reorganization plans to be invalidated are questions solely of statutory construction and legislative intent. See, *e.g.*, *New Orleans* v. *Dukes*, 427 U.S. 297, 302 (1976). Similarly, the question whether this Court's decision in *Chadha* should be

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court proceed with briefing and consideration of the case on the merits. The court of appeals has not yet ruled on the motion to dismiss.

In *Muller Optical Co.* v. *EEOC*, No 83-2836 H (W.D. Tenn. Nov. 10, 1983), appeal pending, No 83-5889 (6th Cir.), the district court rejected a similar challenge to the Commission's authority to enforce the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, which was transferred from the Secretary of Labor to the Commission by Section 2 of the same Reorganization Plan at issue here. The district court there held that the legislative veto provision is severable and that, in any event, Congress ratified the transfer of authority. On November 17, 1983, the plaintiffs in *Muller Optical* filed a notice of appeal to the court of appeals under 28 U.S.C. 1291; they have not sought to appeal the question of relief to this Court under 28 U.S.C. 1252.

applied retroactively to invalidate a reorganization plan that was completed before the date of that decision presents no question of the constitutionality of the Reorganization Act. Indeed, it presents no constitutional issue at all, because the "'federal constitution has no voice on the subject' of retrospectivity." *United States* v. *Johnson*, 457 U.S. 537, 542 (1982) (quoting *Great Northern Ry.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1935)). See also *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 (1982) (plurality opinion of Brennan, J.); *id.* at 92 (Rehnquist, J., concurring in the judgment).

Because the jurisdictional issue under 28 U.S.C. 1252 will be controlled by the Court's decision in *Heckler* v. *Edwards*, we suggest that the Court hold the jurisdictional statement in this case pending that decision. If the Court concludes in *Edwards* that a direct appeal does not lie under 28 U.S.C. 1252 when the appeal does not seek review of the lower court's holding of an Act of Congress unconstitutional, it should dismiss the appeal in this case. If the Court concludes in *Edwards* that a direct appeal must be taken in such circumstances, it then should note probable jurisdiction in this case.

THE QUESTION IS SUBSTANTIAL

The district court plainly erred on the merits in holding that the Commission does not have authority to enforce the Equal Pay Act and in granting summary judgment for appellee on that ground. Although we of course agree that the one-House veto provision in the Reorganization Act is unconstitutional under this Court's decision in *INS* v. *Chadha*, it does not follow that the transfer of enforcement authority to the Commission under a reorganization plan that became effective pursuant to that Act more than five years ago must be invalidated.

1. It should be stressed at the outset that the issue presented here is quite different from—and far narrower than—the severability issue involved in *Chadha*. In that case, the House of Representatives actually had exercised the one-House veto authority contained in Section 244(c)(2) of the Immigration and Nationality Act. Section 244(c)(2) provided that if one House of Congress disapproved the Attorney General's suspension of deportation, "the Attorney General shall thereupon deport such alien * * *." The question whether the legislative veto provision was severable from the remainder of Section 244 was relevant in *Chadha* in determining whether Chadha himself could be granted relief pursuant to the remainder of Section 244 notwithstanding the House of Representatives' veto of the suspension of his deportation and the statutory directive that he be deported because of that veto. In addition, the Court's severability holding in *Chadha* had the effect of permitting the Attorney General to continue to grant suspension of deportation and permanent resident status to aliens in the future without having those decisions subject to the one-House veto mechanism Congress included in Section 244(c)(2). *INS* v. *Chadha*, slip op. 10-14; *id.* at 1-4 (Rehnquist, J., dissenting). Nevertheless, the Court held that the veto provision was severable.

This case is wholly different. Because the President's reorganization authority expired on April 6, 1981 (5 U.S.C. 905(b)), this case does not present any question of whether the President will be permitted to exercise reorganization authority in the future without regard to the legislative veto process. Moreover, unlike the suspension of deportation involved in *Chadha*, the Reorganization Plan at issue here was *not* vetoed by either House of Congress. Because the Reorganization Plan was subject to the control of the legislative veto procedure before it was placed in effect and passed muster

under that procedure, there is no occasion here to consider the broader severability issue involved in *Chadha* of whether Congress would have conferred the authority in question on the Executive *without* subjecting it to the control of a possible legislative veto.[5]

The Reorganization Act itself expressly provides that a Plan that has not been vetoed by either House of Congress during the 60-day period "is effective" (5 U.S.C. 906(a)). The question in this case therefore is whether Congress intended when it enacted the Reorganization Act that Executive action that was not vetoed and therefore became effective *pursuant to* the procedures in the Reorganization Act nevertheless must be invalidated if a court were to conclude at a later date that the unexercised legislative veto authority in the Act is unconstitutional. A compelling showing should be required before the Court attributes to Congress such a perverse intent. No such showing has been made here. In fact, the indicia of legislative intent strongly support the validity of the Plan at issue.

2. As an initial matter, the logic of the legislative veto device itself weighs heavily against invalidation of a reorganization plan that was not vetoed. Supporters of the legislative veto device frequently have defended it on the ground that when neither House of Congress exercises the veto authority, Congress's silence may be taken as approval of the Executive action involved. *INS* v. *Chadha*, slip op. 38 n.22; *id.* at 29-30 (White, J., dissenting). This view was reflected in the consideration of the Reorganization Act of 1977. See H.R. Rep. 95-105, 95th Cong., 1st Sess 11 (1977); S. Rep. 95-32,

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[5] As the court held in *Muller Optical Co.* v. *EEOC*, slip op. 10-15, we believe that Congress would have enacted the reorganization authority without the legislative veto check and that the veto provision therefore is severable. If the Court were to grant plenary review in this case, we would present this broader argument as well.

95th Cong., 1st Sess. 27 (1977) (both quoting the opinion of Attorney General Bell); 123 Cong. Rec. 9350 (1977) (remarks of Rep. Levitas).

Moreover, the Reorganization Act of 1977 was carefully drafted to make it especially likely that reorganization plans would not go into effect unless they met with the approval of Congress (App., *infra*, 12a & n.26). The Act required that resolutions of disapproval automatically would be introduced in the Senate and House on the day following transmittal of a reorganization plan to Congress and would be deemed discharged from the relevant Committee in each House if that Committee did not make its recommendation within 45 days. 5 U.S.C. 910 and 911. The Act then provided that a motion to consider the resolution of disapproval would be in order at any time and would be highly privileged and not be subject to a motion to postpone. 5 U.S.C. 912(a). The obvious purpose of these measures was to assure that even a single Member of the House or Senate could call up the resolution and thereby "virtually assure a vote by both the House and Senate on every plan." H.R. 95-105, *supra*, at 17.[6]

In this case, the House of Representatives expressed overwhelming approval of Reorganization Plan No. 1 of 1978 when it rejected the resolution of disapproval by a vote of 356 to 39. 124 Cong. Rec. 11336-11337 (1978). The Senate Committee on Governmental Affairs unanimously recommended that the Senate likewise reject a resolution of disapproval, and the resolution was not voted upon in the Senate only because its consideration was indefinitely postponed by a unanimous consent

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[6] See also H.R. Rep. 95-105, *supra*, at 2-3; *id.* at 36 (additional views of Chairman Brooks); 123 Cong. Rec. 6146 (1977) (remarks of Sen. Percy); *id.* at 6148 (remarks of Sen. Schmitt); *id.* at 9344 (remarks of Rep. Brooks); *id.* at 9345 (remarks of Rep. Horton); *id.* at 9348 (remarks of Rep. Fascell); *ibid.* (remarks of Rep. Levitas); *id.* at 9359, (remarks of Rep. Drinan).

agreement under which even a single Senator could have objected and insisted that the matter be taken up. 124 Cong. Rec. 12888 (1978). It seems most unlikely that Congress would have intended for a court to invalidate a reorganization plan that became effective according to procedures that both were designed in general and operated in the particular case to ensure that the plan met with the approval of Congress before it was implemented.

A number of other provisions of the Reorganization Act further support this conclusion. First, as noted above, 5 U.S.C. 906(a) expressly provides that a reorganization plan that was not vetoed within the 60-day period allowed "is effective." Second, the Reorganization Act itself contains an explicit legislative validation of the exercise of statutory authority by the transferee agency: 5 U.S.C. 907(a) provides that if a statute "has vested the functions in the agency from which it is removed under the reorganization plan, the function, insofar as it is to be exercised after the plan becomes effective, *shall be deemed as vested in the agency under which the function is placed by the plan*" (emphasis added).

Third, 5 U.S.C. 906(d) provides that a "reorganization plan which is effective shall be printed * * * in the Statutes at Large in the same volume as the public laws * * *." This passage accords a special stature to reorganization plans equivalent to that of public laws, which of course remain in effect until amended or repealed by Congress itself. Fourth, it is significant that the Executive action involved here is that of the President, not of a subordinate officer as in *Chadha*—a factor that likewise accords special stature and finality to a completed reorganization plan. Because the President's action "was taken pursuant to specific congressional authorization, it is 'supported by the strongest of presumptions and the widest latitude of judicial interpretation, and

the burden of persuasion would rest heavily upon any who might attack it.'" *Dames & Moore* v. *Regan*, 453 U.S. 654, 674 (1981) (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). These provisions of the Reorganization Act confirm that Congress did not intend a completed reorganization plan to be undone if the unexercised legislative veto authorization was later held to be unconstitutional.

3. In addition, since Reorganization Plan No. 1 was implemented, Congress has explicitly ratified the transfer of authority to the Commission. In the applicable appropriations act for fiscal year 1983, Congress appropriated funds "[f]or necessary expenses of the Equal Employment Opportunity Commission as authorized by Title VII of the Civil Rights Act of 1964, 29 U.S.C. 206(d) and 621-634 * * *."[7] Pub. L. No. 97-377, 96 Stat. 1830, 1874. The explicit reference to 29 U.S.C. 206(d)—the Equal Pay Act—makes clear that Congress intended the Commission to exercise the authority transferred to it under the Reorganization Plan. *Fleming* v. *Mohawk Co.*, 331 U.S. 111, 116 (1947); *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 301-302 (1937). See *Muller Optical Co.* v. *EEOC*, No. 83-2836 (W.D. Tenn. Nov. 10, 1983), slip op. 15-18.

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[7] 29 U.S.C. 621-634, mentioned in the appropriations act, is the Age Discrimination in Employment Act of 1967. Authority to enforce that Act also was transferred to the Commission by Reorganization Plan No. 1 of 1978 (see note 2, *supra*), and the reference to that Act therefore constitutes a further ratification of the Plan. In addition, Section 905 of the Civil Service Reform Act of 1978 (Pub. L. No. 95-454, 92 Stat. 1224, 5 U.S.C. 1101 note) provides that "[a]ny provision in either Reorganization Plan Number 1 or 2 of * * * 1978 inconsistent with any provision in this Act * * * is hereby superseded." This statutory reference constitutes a ratification of the named Reorganization Plans to the extent they were not superseded. *Fleming* v. *Mohawk*, 331 U.S. at 118-119; *Isbrandtsen-Moller Co.* v. *United States*, 300 U.S. 139, 147-148 (1937).

What is more, Congress appropriated funds to the Commission for fiscal year 1984 in terms identical to those in the 1983 appropriations act that explicitly refer to the Equal Pay Act (Pub. L. No. 98-166, 97 Stat. 1071 (enrolled bill (H.R. 3222, 98th Cong., 1st Sess. at 18, (1983)), signed by the President on Nov. 28, 1983)). This appropriations act was passed after this Court's decision in *Chadha* made clear that the legislative veto provision of the Reorganization Act is unconstitutional. It therefore removes any doubt about whether Congress intends for the Commission to continue to enforce the Equal Pay Act despite the latent legislative veto defect in the Reorganization Act.[8]

[8] The district court did not discuss the decisions of this Court cited in the text that specifically address the question of congressional ratification of a presidential reorganization by the appropriation of funds to the transferee agency to carry out the function in question. That court instead relied principally on *Greene* v. *McElroy*, 360 U.S. 474, 506-507 (1959), in which the Court held that an appropriation of funds to the Defense Department for various aspects of a security clearance program could not be regarded as a ratification of the precise hearing procedures being challenged, which raised substantial constitutional questions. App., *infra*, 17a-18a. This case is wholly different. The appropriation acts are not relied upon here as a ratification of the Commission's procedures in enforcing the Equal Pay Act, but rather as a ratification of the Commission's authority to enforce the Act. The appropriations acts are unambiguous on this point.

This case also is quite different from *TVA* v. *Hill*, 437 U.S. 153, 180-193 (1978), also relied upon by the district court (App., *infra*, 18a). There, the Court held that a lump sum appropriation to the TVA did not constitute a repeal of the substantive restrictions of the Endangered Species Act as applied to Tellico Dam. Here, unlike in *TVA* v. *Hill*, the appropriations act itself contains the operative language that establishes Congress's intent. Moreover, here the argument is that the statutory language simply *ratifies* the continued exercise of enforcement au-

4. In any event, this Court's decision in *Chadha* should not be applied retroactively to invalidate reorganization plans that were not vetoed by either House of Congress and were implemented before the date of the decision in that case. This Court has identified three considerations that bear upon the issue of retroactivity of its decisions:

> [first] whether the holding in question "decid[ed] an issue of first impression whose resolution was not clearly foreshadowed" by earlier cases * * *; second "whether retrospective operation will further or retard [the] operation" of the holding in question * * *; and third whether retroactive application "could produce substantial inequitable results" in individual cases * * *.

Northern Pipeline Construction Co. v. *Marathon Pipe Line Co.*, 458 U.S. at 88 (plurality opinion of Brennan, J.) (quoting *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971)). All three of these factors weigh against retroactive application of the *Chadha* holding in this case.

First, the Court in *Chadha* decided an issue of first impression, and its conclusion was not "clearly foreshadowed" by prior decisions of the Court. Second, retroactive application of the *Chadha* holding in the circumstances of this case is not necessary to further the operation of that holding. The potential constitutional defect in the statutory procedure remained dormant in this case, because the one-House veto permitted by 5 U.S.C. 906 was never exercised. Thus, retroactive application is not necessary here to invalidate action actually taken by one House of Congress in violation of the constitutional requirements of bicameralism and presentment to the President, as in *Chadha* itself.

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thority under a reorganization already in place. In *TVA* v. *Hill*, the claim was one of implied *repeal* of substantive law.

Third, retroactive application of the decision in *Chadha* here would produce manifestly inequitable results by disrupting established enforcement procedures in a substantial number of pending cases and in the administration of the Equal Pay Act generally. We have been informed by the Commission that there now are pending 62 Equal Pay Act cases and 105 Age Discrimination in Employment Act (ADEA) cases brought by the Commission. If the Commission's suits are dismissed, substantial confusion may arise with respect to whether actions may be brought by the individual discriminatees under 29 U.S.C. (& Supp. V) 216(b) and (c) and whether the Secretary of Labor may reassume enforcement authority and be substituted as a plaintiff in these cases. In contrast, the defendants in these suits, such as appellee Allstate, have no substantial equitable claim to retroactive application of the *Chadha* holding: the Reorganization Act and Plan did not alter their substantive obligations under the Equal Pay Act or ADEA, and there is no reason to believe that their liability has been affected in any way by the fact that it is the Commission rather than the Secretary of Labor who has brought the suits. A consideration of the equities and the public interest in administrative stability strongly support the conclusion that the Court should not undo the understanding by all concerned over the last five years that the Commission is the proper agency to enforce the Equal Pay Act—an understanding that was confirmed by Congress in appropriating funds to the Commission for the current fiscal year after *Chadha* was decided.[9]

[9] There are nine other reorganization plans that were implemented pursuant to the 1977 Act whose validity also might be called into question by a retroactive application of *Chadha* in circumstances such as those presented here.

CONCLUSION

The jurisdictional statement in this case should be held pending a decision in *Heckler* v. *Edwards*, No. 82-874. If the Court concludes in *Edwards* that an appeal does not lie under 28 U.S.C. 1252 when the appellant does not seek review of the district court's holding that an Act of Congress is unconstitutional, the Court should dismiss the appeal in this case for lack of jurisdiction. On the other hand, if the Court affirms the judgment of the court of appeals in *Edwards*, it should note probable jurisdiction in this case. In that event, the Court may wish to consider summary reversal of the judgment of the district court.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

DAVID L. SLATE
General Counsel
Equal Employment Opportunity Commission

DECEMBER 1983

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. J82-0186(B)
Filed: Sep 9, 1983

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

v.

ALLSTATE INSURANCE COMPANY

MEMORANDUM OPINION

On Friday, August 18, 1983, this Court issued a Summary Order granting summary judgment for the Defendant, Allstate Insurance Company. This Memorandum Opinion is written pursuant to that order and incorporates the same.

On April 14, 1982, the Equal Employment Opportunity Commission (hereafter EEOC) sued to enforce the Equal Pay Act. The EEOC alleged that it had authority to enforce the Equal Pay Act[1] pursuant to Section 1 of Reorganization Plan No. 1 of 1978, 92 Stat. 3781, which amended 29 U.S.C.A. §§216(c) and 217. Reorganization Plan No. 1 of 1978 was "enacted" pursuant to the Reorganization Act of 1977, 5 U.S.C.A. Section 901, *et seq.*

The present motion for summary judgment made by Allstate places before this Court the legal question of whether or not the EEOC has the authority to enforce the Equal Pay Act by the initiation of litigation.[2] There

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[1] 29 U.S.C.A. § 206

[2] The EEOC's authority to sue is alleged to exist by virtue of 29 U.S.C.A. §§ 216 and 217 whereby the Secretary of Labor may bring an action to enforce 29 U.S.C.A. § 206.

are no genuine issues of material fact with regard to the matters presented by this motion; therefore, it is appropriate to decide the issue of law by summary judgment.

ONE-HOUSE VETO

The basis of Allstate's motion for summary judgment relates to the one-house veto provision contained in the Reorganization Act of 1977. Under this Act the President was granted the authority to present reorganization plans to Congress which either House of Congress could veto by a resolution passed by a majority vote. Reorganization Plan No. 1 of 1978 was not objected to by either House and therefore was "enacted" into law. Section 1 of this Plan transferred the enforcement of the Equal Pay Act from the Labor Department to the EEOC. See 1978 *U.S. Code Cong. & Ad. News* 9799 (reprint of Reorganization Plan No. 1 of 1978).

In a recent United States Supreme Court decision the question of the constitutional validity of one-house veto provisions was decisively resolved. The motion before this Court for summary judgment is based on this decision and the determination of its effect under the facts presented here.

CHADHA

On June 23, 1983, the United States Supreme Court announced its decision in *Immigration and Naturalization Service* v. *Chadha*, ___ U.S. ___, 51 U.S.L.W. 4907 (June 23, 1983). *Chadha* held that the retention by Congress of the power to veto the act of the Attorney General suspending deportation proceedings violated the constitutional doctrines of separation of powers and the constitutional requirement that legislation be accomplished by action by both houses of Congress and by presentment to the President of the United States. *Chadha*, ___ U.S. at ___, 51 U.S.L.W. at 4914-16. The Supreme Court's exhaustive analysis of the history

behind Article I and its limit on the exercise of legislative power are unnecessary to repeat.[3] Congress may *legislate* and grant certain power, but it may not *revoke* that power granted without *legislating* again.[4] In *Chadha* the Supreme Court found that the one-house veto provision not only violated the bicameralism and presentment requirements of the Constitution, but also infringed upon the doctrine of separation of powers.[5]

STANDING

The EEOC asserts a standing argument which, if sustained, would preclude summary judgment.

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[3] The Supreme Court took great care to emphasize the difficulty of their decision in light of the efficiency and proliferation of the one-house veto as a tool of government. It is clear that their decision goes to the bedrock of our Constitution and examines the reasons for their limitations on the exercise of legislative power.

[4] There are exceptions to the requirement that bills must be passed by both Houses and presented to the President:

> There are but four provisions in the Constitution, explicit and unambiguous, by which one House may act alone with the unreviewable force of law, not subject to the President's veto:
>
> (a) The House of Representatives alone was given the power to initiate impeachments. Art. I, § 2, cl. 6;
>
> (b) The Senate alone was given the power to conduct trials following impeachment on charges initiated by the House and to convict following trial. Art. I, § 3, cl. 5;
>
> (c) The Senate alone was given final unreviewable power to approve or to disapprove presidential appointments. Art. II, §2, cl. 2;
>
> (d) The Senate alone was given unreviewable power to ratify treaties negotiated by the President. Art. II, § 2, cl. 2.
>
> Clearly, when the Draftsmen sought to confer special powers on one House, independent of the other House, or of the President, they did so in explicit, unambiguous terms.

Chadha, 51 U.S.L.W. at 4917. Other limited exceptions were noted, *Id.* at n.20.

[5] *Id.* at 4918.

The EEOC alleges that Allstate does not have standing to challenge the constitutionality of the Reorganization Act of 1977 by claiming that Allstate was not injured by that Act, even if it is unconstitutional.

It is beyond dispute that every defendant has standing to question the legal authority of the plaintiff to sue. The EEOC has attempted to turn Allstate's defense into an offensive weapon by questioning Allstate's standing to assert the alleged constitutional infirmity as a defense. Clearly Allstate has standing to challenge the plaintiff's legal right to sue, but assuming arguendo, that standing is not self-evident in this case this Court will address the merits of the EEOC's standing argument.

The EEOC claims that Allstate has no injury such as may satisfy the standing requirements of Article III of the Constitution. The Article III requirement of standing was recently summarized by the Supreme Court in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) as follows:

> At an irreducible minimum, Art. III requires the party who invokes the Court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision". *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976). In this manner does Art. III limit the federal judicial power "to those disputes which confine Federal Courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." (citations omitted).

Allstate has shown that it has personally suffered actual injury in that it has been subjected to a law suit filed pursuant to an unconstitutional statute. There is no doubt that a favorable decision by this Court would redress the injury of which Allstate complains. The identification of this injury to the allegedly unconstitutional passage of the Reorganization Plan No. 1 of 1978 is obvious insofar as the EEOC would have no legal authority to engage in litigation for the purpose of enforcing the provisions of the Equal Pay Act without a constitutional delegation of power from Congress. Therefore, the injury of Allstate in that it is subject to litigation[6] at the instance of a governmental agency whose authority to institute such litigation is being questioned on constitutional grounds meets the Art. III requirements of injury in fact which is traceable to the alleged illegality and which will be redressed by a favorable decision.[7]

UNCONSTITUTIONALITY OF THE ONE-HOUSE VETO

Any use of a legislative veto scheme which has the effect of enacting laws without complying with the Constitutional prescription for legislation is unconstitutional.[8]

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[6] Allstate has submitted an uncontroverted affidavit outlining the scope and effect which this suit has had on its operation as a business as well as the expense it has incurred in its defense.

[7] The EEOC has asserted that Allstate would have been subject to suit by the Labor Department if the responsibility for enforcing the Equal Pay Act had not been transferred to the EEOC. This is speculation on the part of the EEOC and there is no evidence which has been submitted to this Court to substantiate such allegations. This Court may not engage in speculation as to what the Department of Labor would do if it were charged with enforcing the Equal Pay Act.

[8] The Constitution sets forth the "prescription for Legislative action: passage by a majority of both Houses and presentment to the President." *Chadha*, ___ U.S. ___, 51 U.S.L.W. at 4918.

The EEOC urges that since both Houses of Congress rejected a veto of the Reorganization Plan, the "enactment" was constitutional. A resolution to disapprove the Plan was introduced in

I.

The first issue to decide is whether the action complained of here was "essentially legislative in purpose and effect." *Chadha*, ___ U.S. at ___, 51 U.S.L.W. at 4916. The reorganization accomplished under the Plan altered the legal status of agencies and of individuals, including Allstate, by transferring enforcement functions of the Equal Pay Act from the Department of Labor to the EEOC. Such reorganization of the Executive Branch is a legislative function.[9] The reorganization became published law just as though it had been introduced into Congress as a regular bill and thereafter passed by both Houses and not vetoed by the President.

This Court must conclude that the reorganization was essentially legislative in its purpose and effect.

II.

This conclusion takes us to the second issue: Does the fact that no veto was interposed alter the requirements of bicameralism and presentment?

The question presented by this case is not directly answered in *Chadha*. *Chadha* did emphasize the importance of preserving the separation of powers between the executive and legislative branches of government.[10]

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the House and defeated, but the Senate never acted on a similar resolution. *See* 124 Cong. Rec. 1136-37 (1978) (house vote to disapprove resolution objecting to plan); S. Rep. No. 750, 95th Cong., 2nd Sess. 1 (1978) (committee report approving plan; no vote on the floor was taken).

[9] Representative Brooks noted that "[d]etermination of the organizational structure of the executive branch is a legislative function. Make no mistake about that." 124 *Cong. Rec.* 9344 (1977).

[10] "The bicameral requirement, the Presentment Clause, the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident ex-

Moreover, the Court noted that "[t]o allow Congress to evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence cannot be squared with Art. I." *Chadha*, ___ U.S. at ___, 51 U.S.L.W. at 4918 n.22. It is evident from the opinion in *Chadha* that "every use of the legislative veto" is invalid.[11]

The fundamental problem with the legislative retention of veto power is that it places the executive in the position of legislating subject to a Congressional veto.[12] In this sense it stands Art. I of the Constitution on its head. Congress has various tools by which it may control its grant of power, but "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." *Id.* at 4917. Because the Court in *Chadha* clearly sweeps with a broad stroke in its holding that the legislative one-house veto is unconstitutional, this Court must follow that precedent[13] by holding that a retained one-house veto is unconstitutional even when not exercised.

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ercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded."

Chadha, ___ U.S. at ___, 51 U.S.L.W. at 4918.

[11] *Id.* (Powell, J. concurring). Justice Powell perceives that the *Chadha* decision is based on broad constitutional doctrines such that every use of the one-house veto is impermissible.

[12] It has been noted that the presence of a one-house veto makes it necessary to defer to individuals in Congress in formulating proposals because of the increased power of a small minority to achieve a legislative result. *Clark* v. *Valeo*, 559 F.2d 642, 681 (D.C. Cir. 1977) (en banc) (MacKinnon, J. dissenting).

[13] *See* Consumer Energy Council of America *v.* FERC, 673 F.2d 425 (D.C. Cir. 1982), aff'd, ___ U.S. ___, 51 U.S.L.W. 3935 (1983). The Supreme Court affirmed the court of appeals without opinion upholding the decision in *Chadha*.

III.

The EEOC has argued that the constitutional issue is not ripe for decision because no veto power was exercised by Congress. The EEOC cites *Clark* v. *Valeo*,[14] 559 F.2d 642 (D.C. Cir. 1977)(*en banc*), a case in which no veto was exercised. The Court in *Clark* v. *Valeo* states that "[a] contention that there are no real considerations of ripeness here can rest on a view of the merits that a one-house veto is so patently unconstitutional that nothing more is needed to inform the judgment of this Court." *Id.* at 649.

The Court in *Clark* v. *Valeo* relied on Justice White's concurring opinion in *Buckley* v. *Valeo*, 424 U.S.1, 257-86 (1976) (White, J., concurring) where he concluded that the one-house veto provision was constitutional. The Court in its *per curiam* opinion in *Buckley* v. *Valeo*, did not reach the issue of the constitutionality of the unexercised one-house veto.[15] Justice White *alone* reached the one-house veto finding it constitutional.

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[14] *Clark* v. *Valeo* dismissed the constitutional attack on the one-house veto as unripe. The *Clark* Court held that there were two parts to the statutory scheme in question: first, the statute provided for a laying-over period which was found unconstitutional under *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941); secondly there was a provision that the veto under the laying-over provision might be accomplished by the unicameral or one-house veto. *Clark*, 559 F.2d at 649. The Court determined that the second part of review provision had not come into play because Congress adjourned *sine die* two days prior to the running of the laying-over period during which the veto might have been interposed.

On this basis the constitutional attack on the one-house veto was dismissed as unripe. *Id.* at 650.

[15] The Supreme Court cites *Buckley* v. *Valeo* in its *Chadha* decision but does so for general principles of constitutional adjudication and separation of powers, not in the context of addressing the validity *vel non* of the one-house veto.

Chadha has intervened at this juncture, and under the theory of the *Clark* v. *Valeo* court that an adjudication of the constitutionality of an unexercised one-house veto would be ripe only if it were patently unconstitutional, this Court today holds that *Chadha* must be read to say that "[t]o allow Congress to evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence cannot be squared with Art. I."[16] To rely on Justice White's concurring opinion in *Buckley* v. *Valeo* at this point would be suspect because Justice White was one of the two dissenters writing to uphold the one-house veto provision in *Chadha*, ___ U.S. at ___, 51 U.S.L.W. at 4920.

This Court is bound by the Supreme Court's decision in *Chadha* and must follow its instruction. The reasons noted in *Clark* v. *Valeo* for not addressing the constitutional issue presented by the one-house veto, whether it is exercised or not, have evaporated.[17]

SEVERABILITY

The United States Supreme Court has recently restated the general rule that the invalid parts of a statute are to be severed "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976), quoting *Champlin Refing Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932). There is no severability clause present in the Reorganization Act of 1977.[18] This Court

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[16] *Chadha*, ___ U.S. at ___, 51 U.S.L.W. at 4918 n.22.

[17] *See Clark* v. *Valeo*, 559 F.2d at 650 n.10 (reasons for not reaching the constitutional issue).

[18] The absence of a severability clause suggests the inseverability of the provision, *see Carter* v. *Carter Coal Co.*, 298 U.S. 238, 312-13 (1936) (in absence of a severability clause, the presumption is against mutilation of the statute and that the statute was intended to be effective in its entirety).

must then "embark on that elusive inquiry", *Chadha*, ___ U.S. at ___, 51 U.S.L.W. at 4911, to determine "whether Congress would have enacted other portions of the statute in the absence of the invalidated provision." *American Federation of Government Employees* v. *Pierce*, 697 F.2d 303, 307 (D.C. Cir. 1982) quoting *Consumer Energy Council of America* v. *FERC*, 673 F.2d 425, 442 (D.C. Cir. 1982). If the veto provision in Section 906(a) is severable from the rest of the Reorganization Act, then the President's proposal contained in Reorganization Plan No. 1 of 1978 would presumably be an exercise of executive authority delegated under legislative grant. The essential question which must be answered to determine this is whether or not Congress would have delegated such broad authority to the President without reserving for itself the review power which is contained in the one-house veto provision that has been found unconstitutional by this Court under the Supreme Court's decision in *Chadha*.

The Reorganization Act of 1977 re-established for a three year period the authority of the President to submit plans for the reorganization of the executive branch of the government.[19] Congress was aware that the one-house veto which was contained in the statute passed as the Reorganization Act of 1977 was of questionable constitutionality.[20] Although the Attorney General had is-

[19] H.R. Rep. No. 95-105, 95th Cong., 1st. Sess. 2, reprinted in 1977 *U.S. Code Cong. & Ad. News* 41.

[20] The constitutional issues were discussed at length in the legislative history of this Act. This discussion includes the opinions of constitutional scholars and others. *See* 123 *Cong. Rec.* 9349 (1977) (statement of Rep. Levitas) (arguments against the bill are that it is unconstitutional because it violates the "presentation clause" of the Constitution and that it violates the separation of powers between the executive and legislative branches of government. The representative expressed the view that Justice White's concurring opinion in *Buckley* v. *Valeo* supports the constitutionality of the veto provision and

sued an opinion stating his belief that the veto provision is constitutional,[21] Congress had the benefit of credible advice to the contrary.

In light of these possible constitutional problems an amendment was proposed which purported to restrict the relief which a court might grant to the holding of a single plan unconstitutional instead of all plans which had been passed under that statute.[22] The discussion on this amendment did not even approach the question of whether the one-house veto should be severed from the Act but was focused on whether a court could or would be limited to invalidating one plan instead of all the plans which had been passed by virtue of the one-house veto provision.[23] Evidence that the one-house veto provision was essential to the Congress in enacting the Reorganization Act of 1977 is found in the steps taken by Congress to amend the previous reorganization act to

sets forth other reasons why the veto provision should be upheld and included in the legislation.); H.R. Rep. No. 95-105, 95th Cong. 1st. Sess. 9-17, reprinted in 1977 *U.S. Code & Ad. Cong. News* 49-57 (discussion in legislative history of the constitutional issues involved in the one-house veto provision contained in the Act).

[21] H.R. Rep. No. 95-105, 95th Cong., 1st Sess. 10, reprinted in 1977 *U.S. Code Cong. & Ad. News*, 50. The opinion states in part:

> [I]f the procedures provided in a given statute have no effect on the constitutional distribution of power between the legislative and the executive—that is, the power of Presidential veto is effectively preserved and the principal of bicameralism is respected—*the fact that the procedure is not explicitly authorized by the language of Art. I is not enough to render the statute unconstitutional.* I am of the opinion that the procedure provided in the reorganization statute for congressional disapproval of a reorganization plan submitted by the President satisfies this test and, therefore, is constitutional. (emphasis added).

[22] 123 *Cong. Rec.* 9363-9365 (1977).

[23] *Id* at 9364.

assure that a vote could be taken on each and every plan proposed by the President.[24]

Representative Brooks, one of the sponsors of the Reorganization Act of 1977, stated during floor debate that while "[d]etermination of the organizational structure of the executive branch is a legislative function," the principal issue "to consider here today [is] how much authority the President should have, and what role Congress should play in the reorganization process."[25] Representative Brooks expressed concern over the constitutionality of the veto provision, even to the extent of introducing another bill which did not contain that provision. Representative Brooks explained his position as follows:

> I introduced a reorganization bill that would have met both the objectives of the President and the requirements of the Constitution. Unfortunately, the bill before us today takes a slightly different approach. I have chosen to support it, however, because I believe the new voting procedure—which was taken from my bill—and the limitations on the use of reorganization authority to which the committee agreed, will provide Congress with far more control over reorganization than would have been the case if the President's proposals had gone through unchallenged.[26]

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[24] "A major objective of the sponsors of this legislation was to develop a procedure under which an opportunity for a vote by Congress will be assured on each plan." H.R. Rep. No. 95-105, 95th Cong. 1st. Sess. 8, reprinted in 1977 *U.S. Code Cong. & Ad.News*, 48.

[25] 123 *Cong. Rec.* 9344.

[26] *Id.* The voting procedure to which Rep. Brooks referred is the procedure codified at 5 U.S.C.A. §§908 through 912. The procedure is designed to assure that each house will vote on every plan submitted. Essentially, it involved the automatic introduction of a resolution disfavoring the plan and also that such should be sent to the appropriate committee for consideration

Although not dispositive of the intent of Congress, the statements of one of the legislation's sponsors "deserves to be accorded substantial weight in interpreting the statute." *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976). Representative Brooks expression that Congress wishes to retain control over the President's activities is almost a foregone conclusion. This is obviously the reason Congress inserted the one-house veto provision in the Act and certainly it would not be suggested that the intent of Congress was to allow the one-house veto provision to be severed giving the President free reign to propose and enact whatever reorganization he desired within the framework of the delegation of power contained in the other sections of the Act.[27] Interestingly enough, the amendment which was proposed including a severability provision was introduced for the purpose of limiting the scope of judicial review to any one plan which might come before a court; this amendment was not introduced to in any way sever the one house veto provision from the remaining parts of the Act.[28]

In summary, there is no doubt that Congress intended the one-house veto provision to be an integral and inseparable part of the entire Act such that it would limit the power of the President to propose and enact reorganization plans. Congress expressed without equivocation its desire to restrict the President's power

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and if not reported out of committee after forty-five days it would be placed on the appropriate calendar of the House involved. This procedure is designed to guarantee a vote within the sixty day period which Congress has to consider a reorganization plan. *See* H.R. Rep. No. 95-105, 95th Cong. 1st. Sess. 8-9, reprinted in 1977 *U.S. Code Cong. & Ad. News* 48.

[27] See 5 U.S.C.A. §§904 and 905 (setting out parameters within which the President must act in submitting reorganization plans).

[28] *See supra* notes 22 & 23 and accompanying text.

to reorganize the executive branch. Pursuant to this, the entire Act must be held unconstitutional in that the one-house veto provision was enacted as an integral and inseparable part of the grant of power to the President. It is, of course, unfortunate that Congress chose an unconstitutional means by which to review and restrict the exercise of the authority which it granted to the President.

RETROACTIVE APPLICATION

The Supreme Court in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971) addressed the doctrine of nonretroactivity and its appropriate applications. In that case the Court stated:

> [W]e have recognized the doctrine of nonretroactivity outside the criminal area many times, in both constitutional and nonconstitutional cases. (citations omitted)
>
> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by over-ruling clear past precedent on which litigants may have relied, ..., or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . Second, it has been stressed that "we must ... weigh the merits and demerits of each case by looking to the prior history of the rule in question, its purpose and effect and whether retrospective operation will further or retard its operation." (citation omitted) Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity" (citation omitted)

Chevron Oil Co. v. *Huson*, 404 U.S. at 106-07.

To determine whether a decision should be given only prospective application often involves a determination of the interpretation to be placed on statutes under a given set of circumstances.[29] This Court is bound by the recent Supreme Court decision in *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, ___ U.S. ___, 102 S.Ct. 2858, 2880 (1982). In *Marathon* the Supreme Court invalidated the broad grant of jurisdiction given the bankruptcy courts by statute.[30] In deciding whether the invalidation of this jurisdiction should be applied retroactively, the Court stated "[i]t is plain that Congress' broad grant of judicial power to non-Art. III bankruptcy judges presents an *unprecedented question* of *interpretation* of Art. III." (emphasis added).[31] The Court also noted the substantial injustice and hardship which would be visited upon those who had relied on the statutory grant of power to the bankruptcy courts.

Marathon represented an extreme case where the Supreme Court not only determined that the application of its holding should apply prospectively and not retroactively, but also that it should take effect at a later date. Consistent with that holding they stayed their judgment until October 4, 1982, almost four months after the decision.[32]

It is clear that the decision to deny retroactive application in *Marathon* was based on the pervasive and far-reaching effects of that decision. In contrast, by holding that the Reorganization Act of 1977 is unconstitutional thereby undercutting EEOC's authority to sue, which clearly must rest on a statutory grant of power, this

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[29] *E.g. Valencia* v. *Anderson Bros. Ford*, 617 F.2d 1278, 1288-90 (7th Cir. 1980) *rev'd on other grounds* 452 U.S. 205 (1981) (analyzing decisions which bore on the question of the construction of the Truth in Lending Act).

[30] ___ U.S. at ___, 102 S.Ct. at 2880.

[31] *Id.*

[32] *Id.*

Court decides a narrow and isolated issue, one which is required of it by the United States Supreme Court's decision in *Chadha*.

The three considerations set forth in *Chevron Oil Co.* v. *Huson* must be decided against prospective-only application of the decision of this Court.

First, this is not a case of first impression and the decision of this Court was definitely foreshadowed by prior events. Not only has the Supreme Court acted in *Chadha*, but it has been obvious in a review of the legislative history that Congress was well aware that such a decision might ultimately invalidate their use of the one-house veto scheme.[33]

Secondly, retrospective operation of this holding will not retard the application of *Chadha* which was clearly envisioned by the Supreme Court in its decision in that case. In fact, to deny retroactive application would encourage the EEOC to pursue other similar suits in spite of its lack of a constitutionally sound grant of statutory authority to do so. The fundamental issue must be addressed by Congress which may vest in the EEOC the statutory authority to sue by appropriate *legislative* action.

Thirdly, there are no individual cases in which retroactive application of this decision would produce inequitable results. The Equal Pay Act includes a provision for individuals to sue in their own right.[34] In spite of the United States Supreme Court's obvious recognition that their decision in *Chadha* would have far-reaching effect, the Court engaged in no discussion and gave no indication that *Chadha* should not be applied retroact-

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[33] *See supra* notes 20 through 23 and accompanying text. (legislative history clearly indicates the continuing concern of many members of Congress over the constitutionality of the one-house veto provision and the advice of legal scholars that such provision would be held unconstitutional).

[34] 29 U.S.C.A. § 216(b)(supp. 1982).

ively. While their silence on this issue is not dispositive, it is persuasive.

CONGRESSIONAL RATIFICATION

The EEOC argues that Congress has ratified the transfer of the enforcement function under the Equal Pay Act to the EEOC by its appropriation of funds and other statutory references that have been passed in compliance with the constitutional requirements of bicameralism and presentment. In *Greene* v. *McElroy*, 360 U.S. 474 (1959) the Supreme Court held that Congressional ratification of security clearance procedures which were promulgated by the Secretary of Defense without express authorization of either the President or Congress could not be implied from the continued appropriation of funds to finance the program fashioned by the Department of Defense. In its opinion the Supreme Court stated:

> If acquiescence or implied ratification were enough to show delegation of authority to take actions within the area of questionable constitutionality, we might agree with respondents that delegation has been shown here. In many circumstnces, where the Government's freedom to act is clear, and the Congress or the President has provided general standards of action and has acquiesced in administrative interpretation, delegation may be inferred.... Before we are asked to judge whether, in that context of security clearance cases, a person may be deprived to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. *Cf. Watkins* v. *United States*, 354 U.S. 178; *Skull* v. *Virginia*, 359 U.S. 344. *Such decisions cannot be assumed by acquiescence or non-action. Kent* v. *Dulles*, 357

> U.S. 116; *Peters* v. *Hobby*, 349 U.S. 331; *Ex Parte Endo*, 323 U.S. 283, 301-302. They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, *See Peters* v. *Hobby supra*, but also *because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws.* Without explicit action by law makers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them. (emphasis added).

Green v. *McElroy*, 360 U.S. at 506-07.

Although there is no doubt that Congress has the authority to enact legislation which would vest the power to enforce the Equal Pay Act in the EEOC, "...[i]t must be recognized that there is more than a passing distinction between substantive legislation and appropriation bills." *Pacific Legal Foundation* v. *Goyan*, 664 F.2d 1221, 1226 (4th Cir. 1981). *See Andrus* v. *Sierra Club*, 442 U.S. 347, 355-65 (1979) (analysis of the "careful distinction Congress has maintained between appropriation and legislation." *Id.* at 364, holding that appropriation requests do not constitute proposals for legislation); *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 189-93 (1978) (argument that subsequent appropriations measures which funded the construction of a facility in violation of the Endangered Species Act did not impliedly exempt that specific project from coverage of the Act; a contrary policy would violate express rules of both Houses of Congress providing that appropriation measures may not change existing substantive law).

From the foregoing it is clear that by appropriating funds for the EEOC, Congress has done nothing to directly enact legislation which would address the sub-

stantive issue of the EEOC's authority to institute litigation for enforcement of the Equal Pay Act.

CONCLUSION

Although this decision will have far-reaching ramifications, it is one that is demanded under the clear terms of the decision of the Supreme Court in *Chadha*.

In light of the foregoing discussion of the technical legal principles, this court must conclude that the Reorganization Act of 1977 is unconstitutional. It necessarily follows that the Reorganizational Plan 1 of 1978, which contains the provision allowing the EEOC to enforce the Equal Pay Act, is unconstititutional since the Plan was adopted pursuant to the Act. Finally, it follows that the EEOC has no authority to act as Plaintiff in this cause and that Defendant's motion for summary judgment must be sustained.

THIS THE 9th day of September, 1983.

/S/ WILLIAM H. BARBOUR

United States District Judge

APPENDIX B

IN THE UNITED STATED DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. J82-0186(B)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

v.

ALLSTATE INSURANCE COMPANY, DEFENDANT

ORDER

THIS matter, having come before this Court on Defendant's Motion for Summary Judgment, and the Court having considered the memoranda submitted on behalf of the parties, does find that the Defendant is entitled to a judgment as a matter of law. This Court will issue a memorandum opinion setting forth its findings in regard to the granting of this Motion at its earliest opportunity.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Motion of the Allstate Insurance Company for Summary Judgment be, and the same is hereby granted.

ORDERED AND ADJUDGED this 19th day of August, 1983.

/S/ WILLIAM H. BARBOUR
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

CIVIL ACTION NO. J82-0186(B)

Filed Sept. 16, 1983

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF,

v.

ALLSTATE INSURANCE COMPANY, DEFENDANT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Equal Employment Opportunity Commission, the plaintiff above-named, hereby appeals to the Supreme Court of the United States from the order granting summary judgment in favor of Allstate Insurance Company entered in this action on August 19, 1983.

This appeal is taken pursuant to 28 U.S.C. § 1252.

Respectfully submitted,

/S/ _____

JEROME C. ROSE
Regional Attorney

MILDRED BYRD
Supervisory Trial Attorney

DAVID BARNES
Senior Trial Attorney

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2121 Eighth Avenue, North
Birmingham, AL 35203-2397

DAVID L. SLATE
General Counsel

MICHAEL A. MIDDLETON
Associate General Counsel

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 E Street, N.W.
Washington, D.C. 20506

APPENDIX D
STATUTORY AND REORGANIZATION PLAN PROVISIONS INVOLVED

1. The Reorganizaton Act of 1977, Pub. L. No. 95-17, 91 Stat. 29, as codified at 5 U.S.C. 901 *et seq.*, provides in pertinent part:

§ 901. Purpose

(a) The Congress declares that it is the policy of the United States—

(1) to promote the better execution of the laws, the more effective management of the executive branch and of its agencies and functions, and the expeditious administration of the public business;

(2) to reduce expenditures and promote economy to the fullest extent consistent with the efficient operation of the Government;

(3) to increase the efficiency of the operations of the Government to the fullest extent practicable;

(4) to group, coordinate, and consolidate agencies and functions of the Government, as nearly as may be, according to major purposes;

(5) to reduce the number of agencies by consolidating those having similar functions under a single head, and to abolish such agencies or functions thereof as may not be necessary for the efficient conduct of the Government; and

(6) To eliminate overlapping and duplication of effort.

(b) Congress declares that the public interest demands the carrying out of the purposes of subsection (a) of this section and that the purposes may be accomplished in great measure by proceeding under this chapter, and can be accomplished more speedily thereby than by the enactment of specific legislation.

(c) It is the intent of Congress that the President should provide appropriate means for broad

citizen advice and participation in restructuring and reorganizing the executive branch.

(d) The President shall from time to time examine the organization of all agencies and shall determine what changes in such organization are necessary to carry out any policy set forth in subsection (a) of this section.

* * * * *

§ 903. Reorganization plans

(a) Whenever the President, after investigation, finds that changes in the organization of agencies are necessary to carry out any policy set forth in section 901(a) of this title, he shall prepare a reorganization plan specifying the reorganizations he finds are necessary. Any plan may provide for—

(1) the transfer of the whole or a part of an agency, or of the whole or a part of the functions thereof, to the jurisdiction and control of another agency;

(2) the abolition of all or a part of the functions of an agency, except that no enforcement function or statutory program shall be abolished by the plan;

(3) the consolidation or coordination of the whole or a part of an agency, or of the whole or a part of the functions thereof, with the whole or a part of another agency or the functions thereof;

(4) the consolidation or coordination of part of an agency or the functions thereof with another part of the same agency or the functions thereof;

(5) the authorization of an officer to delegate any of his functions; or

(6) the abolition of the whole or a part of an agency which agency or part does not have, or on the taking effect of the reorganization plan will not have, any functions.

The President shall transmit the plan (bearing an identification number) to the Congress together with a declaration that, with respect to each reor-

ganization included in the plan, he has found that the reorganization is necessary to carry out any policy set forth in section 901(a) of this title.

* * * * *

§ 905. Limitation on powers

(a) A reorganization plan may not provide for, and a reorganization under this chapter may not have the effect of—

(1) creating a new executive department, abolishing or transferring an executive department or independent regulatory agency, or all the functions thereof, or consolidating two or more executive departments or two or more independent regulatory agencies, or all the functions thereof;

(2) continuing an agency beyond the period authorized by law for its existence or beyond the time when it would have terminated if the reorganization had not been made;

(3) continuing a function beyond the period authorized by law for its exercise or beyond the time when it would have terminated if the reorganization had not been made;

(4) authorizing an agency to exercise a function which is not expressly authorized by law at the time the plan is transmitted to Congress;

(5) increasing the term of an office beyond that provided by law for the office; or

(6) dealing with more than one logicaly consistent subject matter.

(b) A provision contained in a reorganization plan may take effect only if the plan is transmitted to Congress within four years of the date of enactment of the Reorganization Act of 1977.

§ 906. Effective date and publication of reorganization plans

(a) Except as otherwise provided under subsection (c) of this section, a reorganizaton plan is effec-

tive at the end of the first period of sixty calendar days of continuous session of Congress after the date on which the plan is transmitted to it unless, between the date of transmittal and the end of the sixty-day period, either House passes a resolution stating in substance that the House does not favor the reorganization plan.

(b) For the purpose of this chapter—

(1) continuity of session is broken only by an adjournment of Congress sine die; and

(2) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of any period of time in which Congress is in continuous session.

(c) Under provisions contained in a reorganization plan, any provision thereof may be effective at a time later than the date on which the plan otherwise is effective or, if both Houses of Congress have defeated a resolution of disapproval, may be effective at a time earlier than the expiration of the sixty-day period required by subsection (a).

(d) A reorganization plan which is effective shall be printed (1) in the Statutes at Large in the same volume as the public laws and (2) in the Federal Register.

§ 907. Effect on other laws, pending legal proceedings, and unexpended appropriations

(a) A statute enacted, and a regulation or other action made, prescribed, issued, granted, or performed in respect of or by an agency or function affected by a reorganization under this chapter, before the effective date of the reorganization, has, except to the extent rescinded, modified, superseded, or made inapplicable by or under authority of law or by the abolition of a function, the same effect as if the reorganization had not been made. However, if the statute, regulation, or other action has vested the functions in the agency from which

it is removed under the reorganization plan, the function insofar as it is to be exercised after the plan becomes effective, shall be deemed as vested in the agency under which the function is placed by the plan.

(b) For the purpose of subsection (a) of this section, "regulation or other action" means a regulation, rule, order, policy, determination, directive, authorization, permit, privilege, requirement, designation, or other action.

(c) A suit, action, or other proceeding lawfully commenced by or against the head of an agency or other officer of the United States, in his official capacity or in relation to the discharge of his official duties, does not abate by reason of the taking effect of a reorganization plan under this chapter. On motion of supplemental petition filed at any time within twelve months after the reorganization plan takes effect, showing a necessity for a survival of the suit, action, or other proceeding to obtain a settlement of the questions involved, the court may allow the suit, action, or other proceeding to be maintained by or against the successor of the head or officer under the reorganization effected by the plan or, if there is no successor, against such agency or officer as the President designates.

(d) The appropriations or portions of appropriations unexpended by reason of the operation of the chapter may not be used for any purpose, but shall revert to the Treasury.

* * * * *

2. The Equal Pay Act of 1963 (Section 6(d) of the Fair Labor Standards Act of 1938), as codified at 29 U.S.C. 206(d), provides:

(d) Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of

sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay hours of employment, or conditions of work.

3. Section 16(c) of the Fair Labor Standards Act of 1938, as amended and codified at 29 U.S.C. (Supp. V) 216(c), provides:

§ 216. Penalties

* * * * *

(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of actions

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under secton 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sum thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered

into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

4. Section 17 of the Fair Labor Standards Act of 1938, as codified at 29 U.S.C. 217, provides:

§ 217. Injunction proceedings

The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title).

5. Section 1 of Reorganization Plan No. 1 of 1978, as printed at 92 Stat. 3781, provides:

REORGANIZATION PLAN NO. 1 OF 1978

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, February 23, 1978, pursuant to the provisions of Chapter 9 of Title 5 of the United States Code.

Equal Employment Opportunity

SECTION 1. *Transfer of Equal Pay Enforcement Functions*

All functions related to enforcing or administering Section 6(d) of the Fair Labor Standards Act, as amended, (29 U.S.C. 206(d)) are hereby transferred to the Equal Employment Opportunity Commission. Such functions include, but shall not be limited to, the functions relating to equal pay administration and enforcement now vested in the Secretary of Labor, the Administrator of the Wage and Hour Division of the Department of Labor, and the Civil Service Commission pursuant to Sections 4(d)(1); 4(f); 9; 11(a), (b), and (c); 16(d) and (c) and 17 of the Fair Labor Labor [*sic*] Standards Act, as amended, (29 U.S.C. 204(d)(1); 204(f); 209, 211(a), (b), and (c); 216(b) and (c) and 217) and Section 10(b)(1) of the Portal-to-Portal Act of 1947, as amended, (29 U.S.C. 259).